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No. 80-1552

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JOSLYN N. WILLIAMS,
Petitioner,

v.

DANIEL J. BOORSTIN,
Librarian of the Library of Congress,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether in a retaliatory dismissal action brought under Title VII of the Civil Rights Act of 1964, the "but for" standard of causation is to be applied; that is, that an employer can prevail by showing that the complainant would have been dismissed in the absence of his protected activity, even though the decision to terminate was motivated in substantial part by complainant's protected activity?

2. Whether an individual's "qualifications" for employment are, under the guidelines of McDonnell Douglas Corp. v. Green, an indispensable element of a prima facie retaliatory dismissal case brought under Title VII?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

No.

JOSLYN N. WILLIAMS,

Petitioner,

v.

DANIEL J. BOORSTIN,
Librarian of the
Library of Congress,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Joslyn N. Williams (hereinafter "Petitioner" or "Williams"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on October 3, 1980 and the order

denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc entered on December 9, 1980.

OPINIONS BELOW

The majority and concurring opinions of the Court of Appeals are reported at 24 E.P.D. ¶31,283 (D.C. Cir. 1980) and are set forth in Appendix A at pp. 1a-52a. The opinion of the United States District Court for the District of Columbia granting judgment to Petitioner Williams is reported at 451 F.Supp. 1117 (D.D.C. 1978) and is set forth in Appendix B at pp. 1b-40b. The orders of the Court of Appeals denying Petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc are set forth in Appendix C at pp. 1c- 3c.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on October 3, 1980. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 9, 1980. This Petition was filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3 provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

STATEMENT OF THE CASE

Petitioner commenced this action in the United States District Court for the District of Columbia on August 14, 1972 contending that the termination of his employment with the Library of Congress (hereinafter "Library") was for racially discriminatory reasons and for his challenges to the employment discrimination which existed at the Library. In an amended complaint, Robert Bostick, another black employee at the Library, joined Williams as Plaintiff and together they sought to represent all black persons who had worked or applied to work at the Library since 1960. On behalf of the class, they sought relief for a wide variety of employment practices dealing with recruitment, hiring, promotion, and termination alleged to violate Title VII of the Civil Rights Act of 1964. On August

20, 1973, the District Court per Judge William B. Jones, denied Plaintiffs' Motion for Class Certification and severed the claims of Williams and Bostick. */

Petitioner Joslyn Williams was a symbol -- a "leader of black employees of the Library" (App. B, p. 1b.). He was their advocate for equal employment opportunities.

This position, however, caused great embarassment to the Library. See App. B,

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*/ In Williams v. Mumford, 511 F.2d 363 (D.C. Cir.), rehearing en banc denied, cert. denied, 42[illegible] U.S. 828 (1975), the Court of Appeals dismissed the appeal challenging the District Court's refusal to certify the case as a class action.

The issue in the Bostick case was whether the Library's refusal to reclassify Bostick's position constituted a violation of Title VII The District Court determined that the Library's conduct was not a pretext for racial discrimination and its ruling was affirmed by the Court of Appeals. See Bostick v. Boorstin, 617 F.2d 871 (D.C. Cir. 1980), cert. denied, No. 79-2030, 49 U.S.L.W. 3270 (October 14, 1980).

p.12 b. For example, in April 1970, a petition addressed to the Librarian was circulated at the Library, urging the selection of Barbara Ringer (who is white) as the next Register of Copyrights. The petition was conceived, prepared and promulgated by black leaders in the Copyright Office including Petitioner. The signers of the petition were both black and white, supervisory and non-supervisory, professional and non-professional employees. The petition focused primarily on:

> "The fact that the Copyright Office is in the midst of crises. The drastic drop in morale at the Office, of which our administrative and personnel problems are symptomatic, has taken its toll on both rank, file and management. The former are increasingly distrustful of their leaders and the latter have found it steadily more difficult to lead. To work out the problems in the Copyright Office a distinctive kind of administrator is needed."

The petition represented a protest against the proposed appointment of Mr. George Cary, and support for the appointment of Ms. Ringer, as Register of Copyrights.

Petitioner, then President of Local 1826 of the American Federation of Government Employees (AFGE), pointed out in a memorandum to Ms. Ringer on June 16, 1970, that:

> "'The problem of discrimination in the Copyright Office is so serious that unless it is dealt with from within, this office will lose control of the situation and it will become a public matter.
>
> "'In my opinion the question of equal opportunity is the most explosive of the issues which confront you.'"

On June 18, 1970, Ms. Ringer, who then occupied the position of Assistant Register of Copyrights, submitted a memorandum to the Register of Copyrights, admitting the existence of what, in her opinion, appeared to be racially discriminatory policies and practices

at the Copyright Office. Mr. Ringer called for a recognition of the problem and a solution to the effects that it had caused. As a result of this memorandum, Ms. Ringer was chastised by the Librarian, L. Quincy Mumford, for admitting error that should not have been admitted. The Librarian indicated to Ms. Ringer that other division chiefs, all of whom were white, had told him that Ringer was making trouble, that she was trying to "stir up a hornet's nest". Thereafter, the Librarian removed Ms. Ringer from any administrative responsibilities with regard to the Copyright Office.

In June 1971, Petitioner presented a resolution to the American Library Association ("ALA") requesting the ALA to investigate the Library to ascertain the existence of racially discriminatory employment policies and practices. Present at that meeting were

management representatives of the Library, including John Lorenz (who is white), then Deputy Librarian for the Library. The Library was very disturbed over the prospect of an ALA inquiry. See App. B, p.11b. The Librarian sought the intervention of the Joint Congressional Committee overseeing the Library, and as a result Congressman Wayne Hays, the Chairman of that committee, attempted to prohibit any outside nongovernmental organization to make any inquiries into the employment policies and practices of the Library.

During the summer of 1971, Williams came into further conflict with the Library administration in the course of assisting black employees of the Stack and Reader Division of the Library who were requesting immediate action to resolve their grievances concerning illegal employment policies and practices.

Williams sought to assist those persons protesting, virtually all of whom were black, while all managerial supervisors of that Division were white. As a result of his assistance to these black employees, Williams received a letter of reprimand from a Library supervisor. Upon receipt of the letter of reprimand, Williams confronted the supervisor informing him that the letter was in violation of the Library's regulations and was a blatant attempt to silence him and prevent him from assisting his fellow black employees who were protesting what they believed to be racial discrimination at the Library. The letter of reprimand was subsequently withdrawn.

The ALA fact finding inquiry team's report was due to be published at the Association's mid-winter convention in January of 1972. Prior to that time, Williams had

requested administrative leave to attend the conference, and was told by his Division Chief, Mr. Richard Glasgow, that it would be in his best interest to "tone down" his activities; that he was sitting on a "keg of dynamite" that could explode. Mr. Glasgow told Williams that someone who was in as much "hot water" as he was should not attend the mid-winter conference in Chicago. Glasgow advised Williams that if he did attend, it would not be to his benefit.

Subsequently, the Library found out that Petitioner was not a graduate of Georgetown Law School and that the educational background information he provided on his employment application was inaccurate. When confronted with this, Williams admitted the inaccuracies, recognizing that he would be subject to some form of punishment, and that he was willing to accept some form of

punishment short of termination. He told then Register of Copyrights, George Cary, that the Library had at no time been misled to their detriment as a result of his statements, and that he had adequately and satisfactorily performed all his job duties.

Cary, however, intimated to Williams that it would be in his best interest not to attend the January convention of the ALA, and that it would be beneficial for Williams to curtail his activities within the Library. Cary stated that he did not think a union was an appropriate vehicle to resolve the differences within the Library, and that the Library's choice of punishment might be determined by Williams' actions within the Library.

The ALA Inquiry Team later concluded that there was institutional discrimination in Library employment practices. On

January 31, 1972 the Library issued a condemnation of the ALA Team, its report, and Williams.

In April 1972, Petitioner, against the advice of Cary and Glasgow, testified as a principal witness on behalf of Ms. Barbara Ringer, the white female Assistant Register of Copyrights who claimed to be discriminated against because of her attempts to eradicate racial discrimination at the Library. The hearing examiner issued a decision in favor of Ms. Ringer, and ordered the Library to take corrective action. Ms. Ringer later became the Register of Copyrights, succeeding

Mr. Cary, who had been found to have a demonstrable anti-black bias.*/

From January through June 1972, the Library was attempting to determine what action, if any, should be taken with regard to Williams' misrepresentations of his educational qualifications and in so doing efforts were made to ascertain from other federal agencies what procedures they followed in situations involving falsifications. Each agency responded that "each case . . .

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*/ It was Mr. Cary who subsequently first recommended that Williams be terminated. Without proper competition or posting Cary improperly assumed the position of Register of Copyrights. See App. B., p. 8 b. At trial, Cary testified that while he recognized the union had a place, Williams spent too much time on union activities and that persons like Williams were "troublemakers who should be punished, not promoted". See App. B, p. 9 b.

[must be] judged on its own merits." It was thus clear that termination was not at all mandated as a result of Petitioner's actions. The form and severity of punishment, if any, was a matter left to the discretion of Library officials.

This is consistent with the testimony of Cary who stated that had Williams shown any remorse, shame or regret for his actions, Cary would have overlooked the matter and recommended no punishment. However, Petitioner's union activities and his efforts to achieve equal employment opportunities for blacks, had unquestionably embarrassed and disturbed the Library's white management.

The District Court found that Petitioner's union activities and efforts to promote equal employment were a substantial factor in the decision to terminate Williams. The Court was persuaded in part by the testimony

of Ms. Ringer who stated that Petitioner was of "very high character and that his reputation with other employees had been . . . exemplary." She testified that in her experience as Register of Copyrights there were closely related incidents of conspicuous advocacy of equal employment opportunities and punishment by the Library administration. Ms. Ringer testified that she was aware there were people in the Copyright Office who were generally opposed to racial equality and had been promoted specifically on the basis of that opposition. She also testified that there were black employees in the Office who should have been promoted but who were not because of their advocacy of equal employment opportunities.

Ms. Ringer further testified that "under ordinary circumstances" the Library administration would not have recommended termination

of Williams' employment. She testified that Williams' circumstances were other than ordinary:

> "He was, in my opinion, a very effective, militant but completely honorable, proponent of equal equality. He, in my opinion, told a lot of things like they were. And it did seem to me that this was just unacceptable to some people and was the ultimate cause of the events that led to his separation."

Weighing all the circumstances and given the credibility of the witnesses, the Court concluded that "the Library decision to terminate Williams was motivated in substantial part by hostile management reaction to his leadership of the minority employees' protests against discrimination, in violation of Section 704(a) of the Civil Rights Act of 1964." App. B, p.22 b.

On appeal, the Court of Appeals obviously incensed by Williams' misrepresentations on

his employment applications, reversed, finding that the District Court misapplied the standards enunciated by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The Court of Appeals ruled that in a case alleging employer discrimination under Title VII, the "but for" test is to be applied (App. A, p.35a); */ the Court also

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*/ Under that standard, the Court of Appeals determined that the Librarian could have done nothing else but discharge Petitioner (App. A, p.40a). That conclusion is clear error. First, it is in direct contradiction with the testimony of Mr. Cary, who indicated that Petitioner would not have been terminated had he shown remorse. Second, the Court of Appeals' conclusion represents an unwarranted factual finding, a finding which can only be made by the trial court. Third, this conclusion effectively rewrites the federal statutory and regulatory scheme. There is nothing compelling dismissal of an employee for falsification of employment records. What action to take in such cases is a matter committed to an agency's discretion.

determined that the "qualifications" of a complainant are, under this Court's decision in McDonnell Douglas Corp. v. Green, supra, an essential component of a prima facie retaliatory dismissal case (App. A, p.31 a). */

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*/ At the time Williams applied for the job of copyright examiner in 1967, the job posting required a legal degree. This requirement, however, was never job validated, nor was it job related. Although the posting required that applicants be law school graduates the Library had a subjective, nonposted exception for law school students or other applicants with equivalent training whom they would consider for the position. Indeed, as of 1967, the copyright office had a sub rosa practice of hiring persons in the examining division who only had a Bachelor's degree and with no previous experience. In fact, after Williams served in that position he personally observed persons being selected for the position of copyright examiner who only had a high school diploma or Bachelor's degree. All such persons were white. As indicated, infra, this legal degree requirement was subsequently abolished.

Judge Bazelon, although concurring in the result, disagreed with the majority's determination that an employee's qualifications are a critical element of a retaliatory dismissal claim. He also expressed the view that adoption of a "but for" standard of causation in a Title VII retaliation case is both "unexplained and unnecessary". App. A, p.50a.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS OVER THE STANDARD OF CAUSATION IN A TITLE VII RETALIATORY DISMISSAL CASE. THE MOST ANALOGOUS FEDERAL STATUTE TO TITLE VII OF THE CIVIL RIGHTS ACT PRESCRIBES A LESSER STANDARD OF PROOF THAN THE "BUT FOR" STANDARD UTILIZED BY THE DISTRICT OF COLUMBIA CIRCUIT. THE IMPOSITION OF THE STRICT STANDARD IMPOSED BY THE DISTRICT OF COLUMBIA CIRCUIT IS CONTRARY TO THE CONGRESSIONAL PURPOSE OF THE 1964 CIVIL RIGHTS ACT AND PLACES AN UNDUE BURDEN UPON PERSONS ATTEMPTING TO PROVE THAT THEY HAVE BEEN DISCRIMINATED AGAINST FOR ENGAGING IN PROTECTED ACTIVITY.

The Court of Appeals determination to employ a "but for" standard of causation in Title VII retaliatory dismissal cases is in direct conflict with the decisions of another Circuit Court and numerous District Courts. In Monteiro v. Poole Silver Co., 615 F.2d 4, 9 (1st Cir. 1980), the First Circuit stated that where motives for termination in a retaliatory dismissal case are mixed, the impermissible motive must be a "determinative factor" in the employer's decision if plaintiff is to prevail. It is this standard which the District Court applied in determining that the Library's decision to terminate Williams was motivated in "substantial part"

by his protected activity. App. B, p. 22b. */

The Court of Appeals unexplicably decided that the "but for" standard is applicable in retaliatory dismissal cases under Section 704(a), citing three of its previous decisions, none of which involved retaliatory dismissals. The majority also referred in a footnote to this Court's decision in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).

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*/ On the other hand, in Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980), pet. for cert. filed August 21, 1980, No. 80-278, the Eighth Circuit applied the "but for" standard in a retaliatory dismissal claim, while at the same time recognizing that a lower standard of causation is applicable in cases challenging adverse employment actions as racially discriminatory under Section 703(a), 42 U.S.C. §2000e-2(a). See 619 F.2d at 1296, n.7. There is no justification for applying a harsher standard in a retaliatory dismissal case. If anything, the standard to be applied in such cases should at least be equal to, if not more lenient than, that in a Section 703(a) case.

App. A, p.37a, n.51. This Court's decision in Mt. Healthy, however, was rendered in the context of a refusal to rehire where constitutional principles were at stake rather than interpretation of a Congressional determination to eradicate employment discrimination. This Court has previously recognized, albeit in different circumstances, that constitutional standards for adjudicating claims of racial discrimination are not the same as standards applicable under Title VII. See Washington v. Davis, 426 U.S. 229, 239 (1976).

Moreover, the majority of District Courts considering this issue have applied a standard of proof analogous to that utilized in cases brought pursuant to Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) for terminations as a

result of engaging in protected activity.*/ See Godwin v. City of Pittsburgh, 480 F.Supp. 627, 633 (W.D. Pa. 1979); (there is violation of §704(a) as long as retaliatory motive played a part in the adverse action even if not the sole reason); Mead v. United States Fidelity and Guarantee Co., 442 F.Supp. 114, 131 (D. Minn. 1977) (need not show retaliatory discrimination was sole or principal reason for discharge, only that it contributed, among other things, to cause discharge); Kornbluh v. Stearns and Foster Co., 73 F.R.D.

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*/ 29 U.S.C. §158(a)(3) provides in pertinent part as follows:

(a) It shall be an unfair labor practice for an employer - . . .

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

307, 312 (S.D. Ohio 1976) (it is sufficient for plaintiff to show that retaliatory motive played any cause in dismissal); Falkowski v. Perry, 464 F.Supp. 1016, 1020 (N.D. Ala. 1978), vacated, Perry v. Golub, 599 F.2d 1052 (5th Cir. 1979) (only need show retaliation for engaging in protected activity was a factor in the decision to take adverse action); Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976) (statute is violated if retaliatory discrimination by employer contributed, among other things, to cause discharge; */ EEOC v.

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*/ The District Court in Hochstadt cites, in support of this principle, Bradington v. IBM, 360 F.Supp. 845 (D. Md. 1973), aff'd, 492 F.2d 1240 (4th Cir. 1974), and in addition cites Tidwell v. American Oil Co., 332 F.Supp. 424, 430 (D. Utah 1971), for the proposition that Plaintiff should prevail if retaliation is the "principal reason" for a discharge.

Kallir, Philips, Ross, Inc., 401 F.Supp. 66, 72, n.17 (S.D.N.Y. 1975), aff'd 559 F.2d 1203 (2d Cir. 1977), cert. denied 434 U.S. 920 (1977). But see, Sutton v. National Distillers Products Co., 445 F.Supp. 1319, 1327-28 (S.D. Ohio 1978).

The overwhelming weight of authority in this area is against the "but for" standard imposed by the District of Columbia Circuit below. Moreover, analogizing to the similar provisions of the National Labor Relations Act dictates that the "but for" standard is too strict a standard to apply in this circumstance. Cases applying §8(a)(3) of the National Labor Relations Act, the analagous provision of Section 704(a), have ruled that an employee must demonstrate either that his dismissal is "partially motivated" by

retaliatory conduct in order to render it unlawful,*/ or that the retaliatory conduct is the "predominate" or "moving" cause for dismissal. See e.g., Western Exterminator Company v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977) (test is whether business reason or protected activity is "moving cause" for discharge); Stone and Webster Engineering Corp. v. NLRB, 536 F.2d 461, 466-467, n.8 (1st Cir. 1976) (Discharge is improper if discriminatory motive predominates). The similarities of purpose of Section 8(a)(3) of

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*/ See cases cited in EEOC v. Kallir, supra, 401 F.Supp. at 72, n.17. See also, Head Division AMF, Inc. v. NLRB, 593 F.2d 972 (10th Cir. 1979); Edgewood Nursing Center, Inc. v. National Labor Relations Board, 581 F.2d 363 (3d Cir. 1978); and Neptune Water Meter Company v. National Labor Relations Board, 551 F.2d 568 (4th Cir. 1977) (it is enough that a discriminatory motive was a factor).

the National Labor Relations Act and Section 704(a) of the Civil Rights Act are apparent. See Pettway v. American Cast Iron Pipe Co., 411 F.2d, 998, 1005-1007 (5th Cir. 1969) and Hochstadt, supra, 425 F.Supp. at pp. 231-234.

The standard of causation to be applied in Title VII retaliation cases should be similar to that utilized in retaliation cases under the National Labor Relations Act, not those cases seeking protection under the Constitution of the United States. The writ should be granted to resolve this discrepancy.

II. THE WRIT SHOULD BE GRANTED TO CORRECT THE DISTRICT OF COLUMBIA CIRCUIT'S INTERPRETATION OF McDONNELL DOUGLAS CORP. v. GREEN AS REQUIRING A PARTY TO ESTABLISH HIS "QUALIFICATIONS" AS AN INDISPENSABLE ELEMENT OF A PRIMA FACIE RETALIATORY DISMISSAL CASE BROUGHT UNDER TITLE VII.

The Court of Appeals imposed the requirement that a person alleging discrimination as a result of a retaliatory dismissal must establish his or her qualifications for the job. App. A, p.38 a. No other Court has ever characterized an employee's qualifications as an essential element of a prima facie retaliatory dismissal case. Rather, the requirements of a prima facie retaliatory dismissal case under Section 704(a) include:

1. Engaging in a protected activity;
2. Adverse employer action;
3. Causal connection.

See concurring opinion of Judge Bazelon, App. A, p.48 a, n.4; Hochstadt v. Worcester Foundation For Experimental Biology, supra, 425 F.Supp. at 324; McCarthy v. Cortland County Community Action Program, 487 F.Supp. 333, 340 (N.D.N.Y. 1980); Gonzalez v. Bolger,

486 F.Supp. 595, 601 (D.D.C. 1980), per Judge Gesell; Womack v. Munson, supra, 619 F.2d at 1296, n.6; Brown v. Biglin, 454 F.Supp. 394, 399 (E.D. Pa. 1978); Falkowski v. Perry, supra, 464 F.Supp. at 1020; EEOC v. Locals 14 and 15, International Union of Operating Engineers, 438 F.Supp. 876, 881 (S.D.N.Y. 1977).

Although this Court has indicated that a Complainant in a Title VII action may establish a prima facie case by showing "that he applied and was qualified for a job for which the employer was seeking applicants", */ the Court explicitly stated that the facts to be established in Title VII cases will necessarily vary and the specification of the

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*/ McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 802.

prima facie proof suggested in McDonnell Douglas is not necessarily applicable in every respect to differing factual situations. McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 802, n.13.*/ No Court applying the guidelines established by this Court in McDonnell Douglas has ever imposed a qualifications element as part of a retaliatory dismissal claim under Title VII until the Court of Appeals did so in this case.

The majority indicated that qualification of an employee relates to performance requirements, which it believed to be part of

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*/ The suggested guidelines in McDonnell Douglas offer only a sample pattern of proof, not an indication of substantive limits or the only means of establishing a prima facie case. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977); McDonald v. Sante Fe Transportation Co., 427 U.S. 273, 279 n.6 (1976).

a prima facie case. It also indicated that pretext, on the other hand, relates to a comparison between an employer's treatment of the complaining employee versus the employer's treatment of other employees in like situations. App. A, p.33a.

This artificial distinction misapplies the purpose and intent of Section 704(a). A person's job qualifications should not be part of a prima facie retaliation case. It is only in the second stage of proof outlined in McDonnell Douglas when the employer can respond to a prima facie retaliation claim by offering a legitimate reason for dismissal that the issue of an employee's qualifications becomes a factor. A person terminated because of retaliatory conduct is not claiming he was qualified for a certain position, but rather that he was terminated for engaging in protected activity. There is no just

reason why an employee's qualifications need be established as part of a prima facie case in a retaliatory dismissal claim. */

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*/ This problem is especially pertinent here where there was a serious question over the Library's "purported" requirement that an employee have a legal degree to obtain the position of copyright examiner. Having a legal degree was not required for one to properly and capably perform the job of copyright examiner as evidenced by Williams' excellent job performance as well as the performance of many other white copyright examiners who did not have a legal degree. This requirement was confronted by Ms. Ringer who stated at trial that she felt the legal requirement was a mistake and she caused it to be done away with sometime around 1973-1974. There is reason to believe that the legal degree requirement was just a facade for discriminatory conduct, and if the issue had been put to a test in the lower court, it is unlikely that the Library could have met the standard imposed by Griggs v. Duke Power Co., 401 U.S. 431 (1971), that to avoid a finding that the requirement was an unlawful barrier, the employer must show that the requirement bear a demonstrable relationship to successful job performance.

CONCLUSION

For all of the foregoing reasons Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Dated: March 9, 1981 Respectfully submitted,

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Attorneys for
Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

JOSLYN N. WILLIAMS,

Petitioner

v.

DANIEL J. BOORSTIN,
Librarian of the
Library of Congress

Respondent

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for a Writ of Certiorari was mailed, first class postage prepaid, on this 9th day of March, 1981, to:

Office of the Solicitor General
Room 5614
Department of Justice
10th Street and Pennsylvania Ave., N.W.
Washington, D.C. 20530

Steven J. Toll JMB

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1684

JOSLYN N. WILLIAMS

v.

DANIEL J. BOORSTIN, Librarian of the Library of Congress, APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 1633-72)

Argued 11 June 1980

Decided 3 October 1980

Mark N. Mutterperl, Attorney, Department of Justice with whom Alice Daniel, Assistant Attorney General, Charles F. C. Ruff, United States Attorney, and Robert E. Kopp,

Attorney, Department of Justice were on the brief, for appellant. John A. Terry, Assistant United States Attorney and William Kanter, Attorney, Department of Justice also entered appearances for appellant.

Michael D. Hausfeld with whom Jerry S. Cohen and Herbert E. Milstein were on the brief, for appellee.

Before: BAZELON, Senior Circuit Judge, TAMM and WILKEY, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILKEY.

Opinion filed by Senior Circuit Judge BAZELON, concurring in the result.

WILKEY, Circuit Judge: We have before us the case of a man who engaged in an elaborate masquerade as a purported law student, applicant for the bar, then lawyer in order to obtain and keep a job whose specific required qualifications called for a lawyer. Unmasked, his deception exposed, he was discharged, and immediately thereafter brought suit against his former employer, the Librarian of Congress, alleging racial discrimination under Title VII.

It is not disputed that the plaintiff had lied on his job application where he misrepresented his academic credentials; it is not disputed that he lied on occasion during his employment to carry out his masquerade; it is not disputed that he continued to lie even after his superiors confronted him. The only issue is whether the plaintiff was fired in violation of his civil rights. The district court held that Title VII of the Civil Rights Act of 1964[1] was violated by the Library of Congress when it terminated the plaintiff.[2] We reverse the district court on the ground that the employment discrimination standard laid down by the Supreme Court in McDonnell

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1 42 U.S.C. §2000e et seq. (1976).

2 Williams v. Boorstin, 451 F.Supp. 1117 (D.D.C. 1978).

Douglas Corp. v. Green[3] is utterly inconsistent with a finding of discrimination in this case.

I. FACTS

The appellee, Joslyn Williams, who was not a lawyer, held a lawyer's job as a GS-11 copyright examiner at the Library of Congress. As of 11 August 1972 the Library terminated his employment upon learning of his lack of qualification and misrepresentation of that fact. It was in June 1972 that Williams received notice of removal, but he was allowed to submit a letter of resignation in lieu of termination by the Library. Two days before the resignation was to become effective, he attempted to rescind his resignation.

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3 411 U.S. 792 (1973).

The Library refused to accept the withdrawal of the letter of resignation, so Williams was forced to leave the Library on 11 August. The Director of Personnel, Robert W. Hutchison, wrote a letter to appellee, dated 11 August 1972, stating the Library's reasons for continuing to insist on his resignation:

> As you know the Librarian had already approved removal action against you to be effective July 21, 1972. You received ample notice of the specific charges with right to reply, and written notice of final decision. . . . The Acting Librarian accepted your resignation with a departure date agreed upon three weeks past July 21, 1972, specifically August 11, 1972, because of your desire to effect an orderly transition and set in order
> 4 certain employee union business in which you were engaged. This new date of August 11, 1972 was agreed to by the Library solely because of your involvement in these union matters, and because the agency considered it to be in its best interests to

> resolve these union matters with your assistance.[4]

Williams then filed suit under Title VII of the Civil Rights Act, 42 U.S.C. section 2000e-16, asserting that racially discriminatory reasons motivated the Library to terminate his employment and force him to resign.[5]

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4 Reprinted in Joint Appendix (J.A.) at 206-07.

5 In a related case, Bostick v. Boorstin, 617 F.2d 871 (D.C. Cir. 1980) a panel of this court heard the appeal of another employee of the Library of Congress who sued for employment discrimination. Bostick claimed that his job's "GS" classification was too low. Another panel of this court rejected the argument that impermissible racial factors were responsible for the Library's job classification scheme.

In Williams v. Mumford, 511 F.2d 363 (D.C. Cir.) (rehearing en banc denied), cert. denied, 423 U.S. 828 (1975), this court dismissed the appeal pressed by Joslyn Williams and Bostick challenging District Judge Jones' refusal to certify their lawsuit as a class action. Subsequently, the complaints of plaintiffs Williams and Bostick were severed by the district court. Memorandum and Order filed on 20 August 1973, reprinted in J.A. at 80.

Williams started out at the Library in 1967 as a GS-4 in the law section. In a few months he moved up into a GS-7 slot where he was an examiner in the Library's Copyright Division.[6] By 1971 Williams had become a GS-11 and he applied for the GS-12 position of Senior Copyright Examiner. He did not win this last spot.

Our exposition of the remaining factual considerations will quickly highlight three sets of facts: first, it is imperative to appreciate the depth and persistence of

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6 See Williams v. Boorstin, 451 F. Supp. 1117, 1119-23 (D.D.C. 1978). After a trial Judge Oberdorfer made findings of fact which charted Williams' progression through the Library, and catalogued his various misrepresentations. We rely entirely on Judge Oberdorfer's factual findings. We do not, however, draw the same inferences he did.

Mr. Williams' lies and their material relation to his original job and later promotions. Second, we will note Mr. Williams' genuine talent and impressive role as an advocate of employee, especially black-employee, rights. Third, we will look at the factual basis for the trial judge's inference that the Library retaliated against Williams, wrongfully removing him because of his advocacy.

A. LIES AND MISREPRESENTATIONS

Williams is part of that too broad fellowship of educated men and women everywhere who "pad" their resumes inflating their apparent strengths. Unfortunately, Williams went beyond simple puffery and actually lied about his educational accomplishments. These false

statements were criminal.[7]

Directly under a warning in bold type that "[a] false or dishonest answer to any question in this application may be grounds for rating you ineligible for Federal employment, or for dismissing you after appointment, and may be punishable by fine or imprisonment (U.S. Code, Title 18, Sec. 1001)," [8] Williams certified in his 27 January 1967 application [9] that his

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7 18 U.S.C. § 1001 (1976). The penalty for "false, fictitious or fraudulent" misrepresentations to an agency of the United States is a fine of up to $10,000, or imprisonment for not more than five years, or both.

8 Reprinted in J.A. at 135.

9 See id. at 132-35 (Application for Federal Employment (Form SF 71).

statements were true. In fact, they were false--and materially so. He had successfully completed only one year at Dalhousie University Faculty of Law, after which he was not permitted to return because of academic failure.[10] This contrasts with Williams' representation of two years of successful law studies at Dalhousie.[11] Furthermore, because he believed that the Copyright Division preferred to hire lawyers and law students as examiners,[12] Williams fabricated three years of law training at Georgetown University.[13] The truth, however,

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10 See Stipulation of Facts, reprinted in J.A. at 47; see also J.A. at 159-61, 231-32.

11 Id. at 47-48, 132-36.

12 Trial Transcript at 7, reprinted in J.A. at 224.

13 See J.A. at 47-48, 132-36.

is that Williams never enrolled in, attended or audited classes at Georgetown.[14] He also misrepresented somewhat his college studies at Howard University, thus enhancing the number of credit hours he successfully completed.[15] To be sure, he did actually receive a Bachelor of Arts degree from Howard,[16] but this alone would not have entitled him to any consideration whatsoever for the position for which he applied in 1967, and Williams knew this.

Williams perpetuated false representations about his education throughout subsequent job applications for promotions to levels GS-7 and GS-11, and in an unsuccessful application for a GS-12 job.

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14 See Defendant's Request for Admissions and Plaintiff's Responses, reprinted in J.A. at 66, 76; see also J.A. at 147, 232.

15 See J.A. at 156, 189, 230-31.

Though the opinion below reflected more-or-less the plaintiff's falsifications, the district court took a rather curious approach toward them. We are at a loss to understand the casual attitude evinced by the district court in the following quotation:

> By 1971, Williams had performed at least satisfactorily as an examiner and had risen to Grade GS-11. When a position as Senior Copyright Examiner GS-12 became vacant, Williams applied. He did not win the position despite his taking the calculated risk of representing (falsely) that he had attended Georgetown from 1966 through 1970 and had received a J.D. degree there.[17]

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16 (see p. 11a) The degree was awarded 10 June 1960. See id.

17 Williams v. Boorstin, 451 F. Supp. 1117, 1119 (D.D.C. 1978) (emphasis added).

The court continued in this curious vein, stating

> soon after his employment at the Library, Williams began to exhibit lawyer-like skills far exceeding those normally found in a law student or a novice lawyer. He was accepted at the Library as if he had credentials as a lawyer, and represented employees with grievances about unfair employment most effectively. 18

Since Williams was not a lawyer and did not have the legal training he calimed, the "calculated risk" he took was nothing less than intentional deception. Williams' job called for a lawyer but was occupied instead by a mountebank; like all mountebanks successful for a time he had talent in the role he attempted, and probably could have been equally successful in a related field not requiring repeated falsifications had he

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18 Id.at 1119-20 (emphasis added).

chosen to pursue his career honorably.[19]

There is ample evidence in the record that Mr. Williams was hired for lawyers' jobs, because among all the applicants he appeared to be relatively better qualified on the scale of legal education.[20] In fact, when his application for a promotion to a full-time job at GS-7 in the Copyright Office was considered, the Personnel Action Recommendation recited in detail his (purported) academic credentials, stating that Williams "will receive his LL.B. degree [from Georgetown] in June 1969."[21]

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19 It was gaps in his claimed educational background which were eventually noticed by his superiors, resulting in the inquiry which unmasked him.

20 See Personnel Action Recommendation, reprinted in J.A. at 137-38.

21 Reprinted in J.A. at 139-40.

The Recommending Officers were impressed with Williams. They wrote:

> Although Mr. Williams does not entirely meet the posted qualifications in that he does not yet have a law degree, we believe that his varied experience and his overall qualifications make him an unusually promising applicant. We therefore request that an exception be made to the posted qualifications.[22]

In a later memorandum, one of the Recommending Officers confirmed that "[i]t was principally because of his alleged past and continuing law school experience that we decided to recommend Mr. Williams' appointment as a Copyright Examiner."[23] As noted above, Williams perpetuated his story in each of four job applications including the entry-level one. He perpetuated his

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22 Id. at 140 (emphasis added).

23 Id. at 155.

ruse by "acting like a lawyer"--in the words of the district court, "[leading] his friends and his critics to believe him to be a trained and effective lawyer"[24]--and requesting leave in 1970 and again in 1971 supposedly to study and sit for the Maryland bar examination.[25]

Naturally--or, at least reassuringly--it was discovered eventually that Williams as a lawyer was a fake. In a Library training session on copyright law, Williams apparently did not quite "think like a lawyer," thereby arousing the suspicion of the instructor. This suspicion prompted an investigation. The complete record of

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24 Williams v. Boorstin, 451 F. Supp. 1117, 1121 (D.D.C. 1978).

25 Trial Transcript at 146, reprinted in J.A. at 234.

continuous deceit was then revealed, and, after a period of stubborn false denials, subsequently conceded by Williams. An egregious record like this one hardly poses the ideal case for a whisper of a racial discrimination complaint, let alone an employment discrimination lawsuit.

B. WILLIAMS AS ADVOCATE AND EMPLOYEE REPRESENTATIVE

In the words of the district court, Williams "was a 'leader,'" he "was a 'symbol to blacks.'"[26] The record supports this characterization, and we accept it. Neither these accomplishments, nor the personal tragedy exemplified in Williams' rise and fall, however, convert this unsuccessful masquerade into a valid Title VII

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26 Williams v. Boorstin, 451 F. Supp. 1117, 1121 (D.D.C. 1978).

discrimination claim. Obviously, Williams was talented and articulate. He would have to be. He was, after all, promoted on various occasions and had gained the respect of his superiors and fellow workers. He was elected in 1970 as president of Local Employees Union AFGE Local 1826, and as general counsel of the "Black Employees of the Library of Congress" organization.[27] Williams led several personal appeals raising questions about employment practices in the Library. In one extramural appeal, Williams presented a resolution to the American Library Association Council "calling for an inquiry into alleged discrimination in recruitment and promotion at

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27 Id. at 1120.

the Library."[28] The inquiry was undertaken over the Library's objection, and with the diligent assistance of Williams.[29] The record easily supports the view that Williams was a skillful and effective advocate; one whose efforts to combat alleged prejudice might have been described as "militant."[30]

C. FACTS RELATING TO THE DISTRICT COURT'S INFERENCE OF RETALIATION

We have noted in the preceding section that Williams was a powerful proponent of the rights of black employees at the Library. There is also some evidence to

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28 Id. at 1121.

29 Id. It appears that "[t]he inquiry team later concluded that there was institutional discrimination (albeit inadvertent) in Library employment practices." Id.

30 See id. at 1123; Brief for Appellee at 39.

support an inference that Williams' initiative and participation in the American Library Association Council ("ALA") inquiry may have embarrassed the Library.[31] The district court's next step in the chain of inference, however, was something of a post hoc, ergo propter hoc conclusion. The Court wrote:

> So, as was inevitable, it happened... when Williams' ALA activity was reaching a crescendo, an instructor in the Copyright Division, reflecting about Williams' awkward responses to some technical legal problems in copyright training sessions, began privately to question Williams' credentials.[32]

Simply concluding that "there was evidence that the Library did not always cooperate enthusiastically" in administrative

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31 Williams v. Boorstin, 451 F. Supp. 1117, 1121 (D.D.C. 1978).

32 Id.

proceedings, the court was impressed with the testimony of "one witness. . . that part of the problem in resolving discrimination complaints relates to the absence of people who are willing and, more importantly, able to stand up for employees who have grievances; Williams was the only really efficient, effective person available."[33] The court found that since Williams' antidiscrimination pursuits were not entirely unfounded, the "Library. . . had understandable reasons for reacting significantly to Williams' anti-discrimination activities."[34] Furthermore, the court

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33 Id. at 1122.

34 Id.

was persuaded that there was

> threat and provocation inherent in Williams' efforts with respect to Library employment practices. It would have required saintly discipline for these particular Library managers not to be influenced in deciding to terminate him by hostility against his efforts to expose discrimination at the Library.[35]

Again, we see signs of post hoc, ergo propter hoc in the court's inferences which it couched in the subjunctive language underscored above. What "could have been" is never alone a sufficient foundation for a finding of what really "was," and what "could have been" is the language of the district court on this point. The district court recites no act, word or deed hostile or discriminatory to

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35 Id. at 1123.

Williams, either in his presence or among Williams' superiors in private, prior to their discovery of his career of complete deception.

Though the court below somehow found that the Library management was "hostile" to Williams' leadership role,

> [t]he Court fully accepts the testimony of the Library officials that they were without prejudice or bias against minorities, in general, or Williams in particular."[36]

This conclusion, we agree, is easily warranted by noting Williams' rapid rise through the GS levels at the Library as well as recalling an exception made to the posted qualifications that had opened up a job for him.[37] What the record plainly demonstrates

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36 Id.

37 See note 22 & accompanying text supra.

is that Williams' superiors were always favorably impressed with his ability, his poise and articulateness, and that they were convinced of his promise as a continuing Library employee.[38] This is what "was," and this obviously refutes speculation as to discrimination which only "could have been."

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38 E.g., Personnel Action Recommendations, reprinted in J.A. at 139-40, 142-43; United States Government Memorandum, reprinted in J.A. at 198-200.

We realize that the district court may have been influenced by some evidence of discriminatory practices by the Library with regard to other Library employees. In fact, the court's decision can really only be explained in the context of broad-based discrimination which was strongly argued to the district court by the plaintiffs, and to this court on appeal. This suit is not a class action. See Williams v. Mumford, supra note 5, 511 F.2d 363. Consequently, in this case, evidence of systematic or general instances of discrimination can only be collateral to evidence of specific discrimination against the actual plaintiff. We deplore whatever instances of discrimination have

38 (footnote cont. from preceding page) occurred at the Library. We applaud any efforts, including those of Williams, to redress each violation of civil rights. But the case at bar concerns Williams only and we are unavoidably constrained by the facts pertaining directly to his case. At the very least, it is inappropriate to rely on extrapolation from general evidence of discriminatory episodes when there is available specific evidence directly relevant to the particular plaintiff.

The district court was evidently ambivalent; it has provided us with a contradictory message regarding discrimination against Williams himself. The court's inferences are in contrast with undisputed facts. For example, we have quoted in text where the district court explicitly accepts that the Library management was without animus toward Williams. The specific evidence here does not support an inference of discrimination against one Joslyn Williams. This, of course, explains in part why the district court held for the plaintiff but declined to reinstate him in his position at the Library. The court ordered instead a "unique remedy" requiring the Library "to establish and contribute financially to the maintenance of a [legal fund] service for the benefit of Library employees with bona fide discrimination grievances." 451 F. Supp. at 1127. In light of our holding that there was no violation of Title VII and after

38 (footnote cont. from preceding page) Congress's Act of September 30, 1978, Pub. L. No. 95-391, § 308,92 (Stat. 789, barring public expenditures by agencies for legal representation of employees (unless authorized by Congress), the remedy is as moot as it is "unique."

II. ANALYSIS

Williams' undetected lies induced the Library of Congress to hire him just as the revealed lies later induced the Library to fire him. This is the admitted lawful motive for the discharge. The question in this case, then, is only whether the Library terminated him also in unlawful retaliation for (a) his opposition to alleged discrimination by the Library and (b) his participation in anti-discrimination efforts, both protected activities under Title VII.[39] We reverse and

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39. Specifically, the provision reads:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other trianing or retraining, including on-the-job training

hold that the district court's analysis of its own factual findings misapplied the applicable legal standard enunciated in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973).

(footnote continued)

> programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3 (1976).

A. The McDonnell Douglas Standard

The McDonnell Douglas standard prescribes the sequence of proof which a rejected job-applicant must offer to establish an instance of discrimination in the workplace under Title VII. Likewise, McDonnell Douglas applies in retaliation cases where employers discharge or fail to promote employees who have engaged in activities fighting discrimination.[40] The McDonnell Douglas approach directs a Title VII plaintiff to make out a prima facie case of retaliation, thus

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40. For Title VII retaliation cases applying McDonnell Douglas, see, e.g., Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980) (rehearing and rehearing en banc denied); Williams v. Bell, 587 F.2d 1240, 1245-46 n.45 (D.C. Cir. 1978); Rogers v. McCall, 488 F. Supp. 689, 699 (D.D.C. 1980).

shifting to the defendant employer the burden of rebuttal. The employer then may demonstrate a legitimate and nonretaliatory reason for discharging or not promoting the plaintiff. Such a reason would dispel the inference of retaliation. Classic examples of legitimate reasons might be the plaintiff employee's lack of qualifications or subsequent disqualification, or, the elimination of the job for other business purposes.[41] If the employer adduces a lawful reason for his

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41. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

We recognize that the issue of "qualifications" is relevant at each stage of McDonnell Douglas analysis. It arises first in the context of a prima facie case, but as the crucial factor in employer-employee relations qualifications are as important at the "rebuttal" stage and at the "pretext" stage. See notes 42-45, 54-55 & accompanying text infra.

adverse act, the employee may show, in the final step of McDonnell Douglas analysis, that the employer's reason is merely a "pretext" covering up unlawful retaliation through the guise of innocent business planning. McDonnell Douglas is thus more like a map of shifting burdens than it is like a substance-laden rule. "Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."[42]

In the guidelines for a prima facie case McDonnell Douglas suggested one critical element for evaluating Title VII claims of employment discrimination. That factor is one of adequate qualification for the job on

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42. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

the part of the complaining employee.[43] Qualification on the part of the employee, then, would seem to be almost indispensable to a Title VII violation.[44] Title VII imports no suggestion that the less qualified shall be favored over the more qualified simply by virtue of their connection with some protected

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43. McDonnell Douglas, 411 U.S. at 802. Other elements of the prima facie case include: membership in a racial minority, application and rejection from an available job, applications for same job entertained by employer, qualifications of other applicants equivalent to those of complainant. Id.

McDonnell Douglas is to be flexibly applied to different circumstances, of course. See McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273, 379 n.6 (1976).

44. See Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980) (rehearing and rehearing en banc denied) (applying McDonnell Douglas in case of retaliatory termination).

antidiscrimination activity.[45] No good reason exists for allowing a non-qualified employee to invoke Title VII to cure deficiencies in his or her qualifications, or to immunize potentially serious defects in the worker's job profile. It would be incongruous--and certainly not required by law--to give any employee, even one engaged in exemplary efforts to vindicate the law of the land, a stranglehold on a job irrespective of that employee's material, work-related flaws.

The prima facie showing relates qualifications of the particular employee to performance requirements of the particular job. A demonstration of pretext, on the other hand, relates the employer's actual treatment of the particular employee with his or her actual

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45. See Griggs v. Duke Power Co., 401 u.S. 424, 436 (1971).

treatment of other employees in like situations. This line of inquiry may bring out comparative evidence tending to show that the official employment policy regarding the availability of jobs was just a sham--in other words, that an employer treated one group differently from another and was drawing impermissible race distinctions by granting ad hoc variances to the "policy" which allegedly fixed performance requirements.

If the pretext state of McDonnell Douglas analysis is reached at all, it is then that the question of mixed causation--i.e., retaliation plus legitimate business purpose--must be pondered. Appellant Librarian has argued that a Title VII violation is made out only if the employee would have retained his job but for any retaliatory motive.[46] Appellee

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46. Brief for Appellant at 53.

Williams, on the other hand, argues that a "hint" of retaliation would suffice to make a showing of pretext and thereby prove a Title VII violation under McDonnell Douglas.[47] The cases cited to us by appellee imply, mostly by analogy, that adverse action against employees partially undertaken for lawful purposes and partially undertaken for unlawful retaliatory purposes constitutes a violation of Title VII.[48] The law in this circuit, however, is clear.[49] The but for test applies.

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47. Brief for Appellee at 44.

48. E.g., Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); EEOC v. Kallir, Phillips, Ross, Inc., 401 F.Supp. 66 (S.D.N.Y. 1975).

49. See Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978); Rogers v. EEOC, 551 F.2d 456 (D.C. Cir. 1977); Day v. Mathews, 530 F.2d 1983 (D.C. Cir. 1976).

Adapting the language of Day v. Matthews[50] to this case, the but for test might be stated as follows: If the plaintiff has made a showing of "pretext," the defendant employer must then demonstrate by clear and convincing evidence that the plaintiff would have lost his job anyway absent retaliation for the plaintiff's participation in protected conduct. This standard is plainly correct, as it not at all precludes a finding of a Title VII violation when an employer acts from mixed motives. The mere presence of a legitimate purpose underlying the discharge will not sterilize unlawful retaliation, where the latter is in fact the dispositive cause. The but for standard simply compares the adversity faced by the plaintiff employee (who had engaged in conduct protected by Title VII)

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50. 530 F.2d at 1086.

with conditions imposed on similarly situated employees who did not engage in protected conduct.[51]

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51. Cf. Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 286 (1977) ("But that... [marginal] candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.") (Justice Rehnquist writing for a unanimous Court considering a First Amendment constitutional challenge against an unfavorable tenure decision).

B. THE STANDARD APPLIED

When the facts found by the district court and McDonnell Douglas are juxtaposed, it is plain that no Title VII offense has occurred here. Mr. Williams or any other Library employee, civil rights advocate or otherwise, could simply never be entitled to, nor expect to retain, his or her job after establishing such a formidable record of lying to his employer. Trustworthiness, reliability, veracity, good judgment -- these are all material qualifications for any job, including one as a Copyright Examiner, a job also requiring of the office holder a law degree.

As noted above in Part A of this section, qualification of the complainant is the pivotal component of the McDonnell Douglas

prima facie case. It is clear that from the outset Williams was not qualified for the job which he held. He was not a lawyer; the fact that his work product was respected by his superiors does not remedy the credentials gap. (It is significant that, as a practical matter, the absence of legal training showed up in Williams' responses to technical inquiries; the absence of credentials meant more than the lack of a piece of paper.) A lawyer is a lawyer -- a non-law school graduate, who is not admitted to the bar, may attempt, with some success, to do a lawyer's job, but it will only be a deception and a fraud. The analogy to medicine is telling. A quack doctor may be acknowledged as providing some relief to some patients, yet once the lack of license is discovered, the

liberty to practice is foreclosed, absolutely.

A second defect in Mr. Williams' prima facie case can be characterized as disqualification. The lying itself, also from the outset, made him an unfit employee of the Library of Congress, wholly apart from the question of his not being a lawyer or his serving well in assigned tasks. The district court totally failed to appreciate the real-life decisions that an employer must confront.[52] How could Mr. Williams have been retained? Could a responsible Librarian of Congress overlook the before, during, and after chain of falsehoods employed by Williams to keep his government job? What would have

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52 See Aikens v. United States Postal Service Board of Governors, No. 79-1574, slip op. at 6-7 (D.C. Cir. 31 July 1980) (Wilkey, J., dissenting)(dissent filed 9 September 1980).

been the morale of the other employees of the Library, their view of the standards of honesty, probity, good judgment required by (and of) their superiors to hold a position of trust and responsibility at the Library? (In this respect, Mr. Williams' achieved prominence made it even more difficult for a conscientious administrator to do anything but discharge him.) We must agree with appellant that

> since it is a criminal offense to make false statements on federal employment applications and termination of employment is a universally accepted disciplinary action in cases of this sort, it is clear that plaintiff would have been fired notwithstanding any retaliatory motive which may have existed. 53

Under all the admitted circumstances, we think it virtually impossible for the Librarian to have acted other than to dis-

53 Reply Brief of Appellant at 12.

charge Williams.

Though not required, it is sensible to double-check at this stage our holding of no prima facie case by considering the pretext question. There are, of course, illuminating interrelations among all of the Title VII considerations. We see that the but for test is easily satisfied in favor of the employer appealing to this court. The district court made no explicit finding that the Library's admittedly legitimate reasons for firing Williams were "pretextual." The employee's falsification, he admits and the district court found, was knowing and willful.[54] It was also criminal - a compelling

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54 See Trial Transcript at 158-59, reprinted in J.A. 237-38.

factor in any employee retention decision.[55]

Not only is there no evidence that the Library was "just waiting" for an opportunity to invoke some spurious "legitimate" reason to sack Williams for embarrassing the

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[55]In the McDonnell Douglas case itself, the Court indicated that there was no statutory need for the defendant employer to hire a plaintiff employee who engaged in unlawful disruptive activity against the employer. 411 U.S. at 803 & n.17, 804. The disruption in McDonnell Douglas was tainted and disqualified even though it implicated efforts to combat discrimination. The illegality in the instant case bears no relation to an affirmation of civil rights. Lying on application forms and in interviews is reprehensible and without justification as part of an antidiscrimination arsenal. If the appellee truly sought to topple what he may have believed were differential educational requirements for black and white Library employees, he could have challenged the allegedly invidious rule in an Equal Employment Opportunity Commission proceeding. A complainant with "cleaner hands" would have been a persuasive opponent of any veiled employment practices at the Library.

Library by his vocal opposition of discrimination,[56] but it is quite clear that, comparatively speaking, Williams received only his due. In previous instances of falsification by Library employees, four were removed and one was demoted and transferred. The one who was not discharged was black, the race of the others is not known.[57] The district court inevitably recognized that the con-

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[56]In fact, the evidence is to the contrary. Williams had received various promotions and favorable ratings. See notes 6, 20-22 & accompanying text supra.

[57]See J.A. at 162, 214-16, 243, 267; Brief of Appellant at 15-22.

tinued employment of Williams was untenable; presumably, the district court did not order Williams reinstated because of the anomaly and injustice to do so. The district court faulted the Library for disciplining an errant employee, but would not itself reward the mendacious plaintiff.[58] Williams was not a victim at all. He was the responsible agent in his own termination, "generat[ing] his own fate" by choosing an unlawful route to employment opportunity.[59]

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[58] Cf. Williams v. Boorstin, 451 F.Supp. 1117, 1126 (D.D.C. 1978)("But Williams also falsely represented himself to be first a law student and then a law graduate. No court should take such calculated falsehoods lightly.")(footnote omitted).

[59] See Rogers v. McCall, 488 F.Supp. 689, 699 (D.D.C. 1980).

CONCLUSION

We believe that appellee was reasonably and lawfully discharged for his admitted falsifications and demonstrated failure of integrity. Consequently, the judgment below finding a Title VII violation is

REVERSED.

BAZELON, Senior Circuit Judge, concurring in the result: In view of the compelling legitimate reason for the defendant's action, the record does not support the finding that retaliation was a "substantial" cause[1] of dismissal. I therefore join the court's judgment. I am not prepared, however, to agree with two problematic propositions of law unnecessary to the result.

First, neither precedent nor reason explains why an employee's qualifications must be a "critical element" of a discriminatory dismissal claim.[2] Contrary to the

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1 Williams v. Boorstin, 451 F.Supp. 1117, 1123 (D.D.C. 1978).

2 Majority Opinion (Maj. Op.) at 15.

majority's suggestion, the Supreme Court in McDonnell Douglas v. Green[3] did not intend to define the elements of every employment discrimination claim;[4] that case involved a

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3 411 U.S. 792 (1973).

[4]Among the elements of a prima facie case listed in McDonnell Douglas was "that [the plaintiff] belongs to a racial minority." 411 U.S. at 802. In McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273 (1976), the Court found that Title VII prohibited discrimination against all races. The Court noted:

> Our discussion in McDonnell Douglas Corp.v. Green ... of the means by which a Title VII litigant might make out a prima facie case... is not contrary. There we said that a complainant could establish a prima facie case by showing [that he belonged to a racial minority; applied and was qualified for a job for which he was rejected; and, the position remained open]. As we particularly noted, however, this "specification...is not necessarily applicable in every respect to differing factual circumstances." Id., at 802 n. 13.

refusal to hire. The qualifications issue here, on the other hand, seems to be an

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427 U.S. at 279 n.6 (emphasis supplied). McDonnell Douglas offered only a "sample pattern of proof," which was "not...an indication of any substantive limitation..." 427 U.S. at 279 n.6.

The majority contends that Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), and Rogers v. McCall, 488 F.Supp. 689, 699 (D.D.C. 1980), support application of McDonnell Douglas to retalitory dismissal claims, see Maj. Op. at 13-14 & n.40. But in neither case did the court make "qualifications" an element of retaliation; instead, these courts applied the standard found in B.SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 436 (1976)(prima facie case includes: (1) protected activity; (2)adverse employment action; (3) causal connection; burden then shifts to employer to show legitimate reason for dismissal). See Gonzalez v. Bolger, 486 F.Supp. 595, 601 (D.D.C. 1980).

Outside this case law, no substantial reason is suggested why qualifications must be an element of a retalitory dismissal claim. The majority's concern that a "non-qualified employee [will] invoke Title VII to cure [his] deficiencies," Maj. Op. at 15, seems to overlook the second stage of proof outlined in McDonnell Douglas. At that stage, the employer can respond to a prima facie

arbitrary barrier to consideration of the merits; the plaintiff was fired not because he lacked qualifications, but because he lied about them.

Second, the adoption of a "but-for" standard of causation is both unexplained and unnecessary to the decision here.[5] The majority finds that "[t]he law in this circuit...is clear."[6] Although retaliation has been recognized as a dangerous threat

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retaliation claim by offering a legitimate reason for dismissal, which might include lack of qualifications.

[5] Maj. Op. at 16.

[6] Id.

"to the effectiveness of the Act,"[7] none of the cases relied upon by the majority involved retaliation.[8] Nor is any other explanation offered for this standard.[9] Moreover, in view of the court's ruling on the qualifications issue, its discussion of causation must be

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[7]EEOC v. Kallir, Phillips, Ross, Inc., 401 F.Supp. 66, 72 (S.D.N.Y. 1975), (Weinfeld, J.), aff'd, 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977). See Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969). Retaliation represents more than a discreet act of discrimination; it also threatens to chill enforcement of the Act's guarantees. See Gonzalez v. Bolger, 486 F.Supp. 595, 601 (D.D.C. 1980).

[8]See Maj. Op. at n. 49 (Weakhee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978); Rogers v. EEOC, 551 F.2d 456 (D.C. Cir. 1977); Day v. Mathews, 530 F.2d 1083 (D.C.Cir. 1976).

[9]The Eighth Circuit did apply the but-for standard to a retaliation claim in Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980). Cf. Monteiro v. Poole Silver Co., 615 F.2d 4, 9 (1st Cir. 1980) (retaliatory motive must be "determinative factor" of dismissal). But

considered dicta.

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a lower causation standard was applied in EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 72 n.17 (S.D.N.Y.), where Judge Weinfeld rested a Title VII violation on a finding of "partial" retaliatory motivation. In Gonzalez v. Bolger, 486 F.Supp. 595, 602 (D.D.C. 1980), the court considered whether the employer's claimed justification was "in fact a pretext for retaliatory animus...."

I do not suggest which of these standards is appropriate. These facts do not require us to choose a standard for this circuit; the evidence did not support the finding below that retaliation was a "substantial" cause of dismissal. I believe majority to adopt a higher standard than the one applied by that under these circumstances it is inappropriate for the trial court.

APPENDIX B

Joslyn N. WILLIAMS, Plaintiff,

v.

Daniel J. BOORSTIN, Defendant.

Civ. A. No. 72-1633

United States District Court,
District of Columbia,
Civil Division.

April 4, 1978.

Jerry S. Cohen, Michael D. Hausfeld, Kohn, Milstein & Cohen, Washington, D.C., for plaintiff.

Earl J. Silbert, U. S. Atty., Robert N. Ford, Asst. U. S. Atty., James G. Hergen, U. S. Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM

OBERDORFER, District Judge.

Plaintiff, Joslyn N. Williams, is a leader of black employees of the Library of Congress. He brought this suit in 1972 charging that on August 11 of that year, the Library deprived him of his job as Senior Copyright Examiner, GS-12, for racially discriminatory reasons and for exercising his

First Amendment right of free speech in challenging what he saw as employment discrimination at the Library. The Library claims Williams' employment was terminated because he made material misstatements about his employment qualifications.

I.

In an amended complaint, Robert L. Bostick joined Williams as plaintiff, and together they sought to represent all black persons who worked or applied to work at the Library since 1960. On behalf of the class, they sought relief for a wide variety of employment practices dealing with recruitment, hiring, promotion, and termination alleged to violate Title VII of the Civil Rights Act of 1964,[1] as well as the First and Fifth Amendments to the Constitution. On August 20, 1973, Chief Judge William B. Jones denied plaintiffs' motion for class certification and severed the

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1. 42 U.S.C. § 2000e et seq.

claims of Williams and Bostick.[2] Our Court of Appeals dismissed plaintiffs' appeal of that ruling,[3] and on February 12, 1976, Chief Judge Jones denied plaintiffs' motion for reconsideration of the class action determination. This memorandum deals only with the claims of Williams.

Initial pretrial proceeded under the supervision of Judge Jones until November of 1977, when the case was reassigned. There followed additional elaborate pretrial proceedings and a trial to this Court extending over seven days. At the trial, plaintiff, some Library employees friendly to him, and the principal Library officials involved in his case, appeared and testified at length;

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2. Williams v. Mumford, No. 1633-72 (D.D.C., August 20, 1973).

3. Williams v. Mumford, 167 U.S.App.D.C. 125, 511 F.2d 363 (1975) (rehearing en banc denied), cert. denied, 423 U.S. 828, 96 S.Ct. 47, 46 L.Ed.2d 46 (1975).

voluminous documentation was received in evidence. In the course of the pretrial and of the trial, the Court denied plaintiff's renewed motion for class action certification and refused to receive in evidence plaintiff's proffers of expert and other testimony about employment discrimination at the Library generally. On the basis of the relevant evidence of record, as summarized in the narrative below, the Court will enter judgment for Williams. Injunctive relief appropriate to the special circumstances of this case will be granted, and Williams' prayer for back pay will be denied.

Williams' Activities at the Library of Congress

Williams obtained his first job at the Library in 1967 as a GS-4 in the law library. He had graduated from Howard University and had earned one year's credit for legal studies at the Dalhousie Faculty of Law, Halifax, Nova Scotia. Believing, with some reason, that the

Library preferred law students for positions in the law library, Williams falsely stated on his application that he was attending "Georgetown," leaving the erroneous impression by this and other statements and by his conduct that he was in the process of completing law school. A few months later, Williams obtained a GS-7 position as an examiner in the Library's Copyright Division. Believing, again with reason, that the Copyright Division preferred examiners who were law students or lawyers, Williams falsely represented that he was then attending law school.

By 1971, Williams had performed at least satisfactorily as an examiner and had risen to Grade GS-11. When a position as Senior Copyright Examiner GS-12 became vacant, Williams applied. He did not win the position despite his taking the calculated risk of representing (falsely) that he had attended Georgetown from 1966 through 1970 and had received a J.D. degree there.

Meanwhile, soon after his employment at the Library, Williams began to exhibit lawyer-like skills far exceeding those normally found in a law student or a novice lawyer. He was accepted at the Library as if he had credentials as a lawyer, and represented employees with grievances about unfair employment most effectively. In 1970, Williams was elected president of Local Employees Union AFGE Local 1826, and general counsel of an organization known as the Black Employees of the Library of Congress. Appearing for his union at a meeting with Library officials about employment practices, he attracted the favorable attention of Robert W. Hutchinson, Director of Personnel at the Library. To Hutchinson, Williams showed great promise as a leader. Hutchinson noted Williams' ability to articulate the problems, viewpoints, and concerns of union members, to deal reasonably, to see the management side, and to act with integrity in dealing with the concerns of others. Hutchinson

described Williams as a leader and ad hoc lawyer who was "needed at the Library."

In 1971, minority employees in the Library's Stack and Reader Division chose to express their dissatisfaction with Library employment practices by conducting a work stoppage. After consultation with the Department of Justice, the Library discharged a number of the participating employees. Williams interceded on their behalf, and represented them in an unsuccessful attempt to regain their jobs by appeal through the Library's administrative process.

In the wake of the Stack and Reader episode, Williams made a presentation about Library employment practices to some Library officials, including Ms. Barbara Ringer, then Assistant Register of Copyrights. Williams' presentation alerted Ms. Ringer to the depth of the feeling of minority employees and what she came to see as the justice of their grievances about recruitment and promotion of

minority employees. She obtained authority from her superios, Register of Copyrights, Abraman Kaminstein, to attempt some administrative redress of these grievances. In the process she wrote a memorandum to the Librarian. The memorandum was not well received by the Librarian; he strongly criticized her for it. About one month after Ms. Ringer began her effort to improve administration to relieve some of the minority employee grievances, Ms. Ringer's administrative authority was revoked by Kaminstein pursuant to a directive by the Librarian. Thereupon, the Librarian retired Kaminstein from his office as Register, and, without proper competition or posting, persuaded George Cary, another Assistant Register, to take Kaminstein's place as Register.[4]

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4. Ms. Ringer subsequently brought an action before Chief Judge Jones in which she successfully challenged the procedure followed by the Librarian in the appointment of Cary, Ringer v. Mumford, No. 2042-72 (D.D.C. 1972)(Jones, C.J.)

(footnote continued)

Williams actively and publicly opposed the appointment of Cary as Register and circulated a controversial petition supporting Ringer for the position. Cary testified here that he considered himself to be an "old fashioned" person who believed in merit promotion for people who do their job, but who did not believe in promoting people who "spend their time making a lot of noises which is distractive to the efficiency of any office." He testified that while he had recognized that the union had a place, Williams spent too much time on union activities.

When Congress was considering legislation to extend Title VII to employees of the executive branch of the federal government,

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(footnote continued)

Thereafter, on August 10, 1972, a Library hearing officer determined that there had been discrimination in the decision to select Mr. Cary instead of Ms. Ringer as Register. Following the correct procedure, the Library selected Ms. Ringer Register, replacing Cary, who retired. She holds that position now.

Williams drafted and successfully advocated legislation to include employees of the Library of Congress within Title VII.

In 1971, as Cary was replacing Kaminstein and Ms. Ringer was becoming occupied outside the Copyright Division in international copyright affairs at the United Nations Educational, Scientific and Cultural Organization, Williams undertook and pursued a personal appeal to the American Library Association Counsel about employment practices at the Library.[5] In June 1971, he presented to the Counsel a resolution calling for an inquiry into alleged discrimination in recruitment and promotion at the Library. Although John G. Lorenz, Deputy Librarian, personally spoke in

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5. The American Library Association is a private association of institutional members, including the Library of Congress, and private members, including Williams, well respected by the American Library community. It maintains a Standing Committee for the purpose of investigating employment policies and practices for its member institutions.

opposition to the resolution and denied the existence of discrimination at the Library, the Counsil adopted the Williams resolution and commenced the inquiry. The Librarian himself, in response to an ALA request, formally ruled against Library cooperation with the ALA inquiry on the stated ground that it would be "unprecedented action for a professional association to investigate a Federal agency." The decision not to cooperate with the ALA inquiry was considered by the Librarian to be so important that he obtained the written approval of it from then Congressman Wayne Hays and Senator B. Everett Jordon, Chairman and Vice Chairman, respectively, of the Congressional Joint Committee which had oversight responsibility for the Library.

Despite the reaction of the Librarian, and of the leaders responsible for congressional oversight, Williams persisted in assisting the inquiry. The inquiry team later

concluded that there was institutional discrimination (albeit inadvertent) in Library employment practices. The inquiry and report, originated and assisted by Williams, was highly publicized locally, nationally, and internationally. Many employees testified that Williams' role in the inquiry embarrassed the Library.

During all this time, Williams' falsification about his legal education had remained undiscovered. His work and his manner as an advocate and as a leader led his friends and his critics to believe him to be a trained and effective lawyer. Hutchinson's assistant, Eugene Powell, testified, for example, that Williams effectively represented not only blacks at the Library, but also employees generally. As Herbert Belmaer, the Library's Employee Relations Specialist and Fair Employment Practices Officer, testified, Williams had legal expertise to cope with the Library system. He had an understanding of

law and regulations. He was available to employees who couldn't hire a lawyer. And, as Belmaer and others testified, Williams was a "symbol to blacks." He was a "leader."

so, as was inevitable, it happened: in late 1971 or early January 1972, when Williams' ALA activity was reaching a crescendo, an instructor in the Copyright Division, reflecting about Williams' awkward responses to some technical legal problems in Copyright Division training sessions, began privately to question Williams' credentials. The instructor, on his own initiative, checked at Georgetown Law Center. There was no record there of Williams. The instructor reported his findings to his superiors. Confronted with this discovery, Williams confessed that in spite of his many statements and representations as to his status as a law student and later as a lawyer, he in fact was not a lawyer.

There ensued a protracted period of investigation during which Cary, Hutchinson, and

Lorenz met with Williams on a number of occasions to discuss his misrepresentations and the appropriate course of action for the Library. Williams attempted, without effective assistance of counsel, to explain his misrepresentations and protect his job. For example, he attempted to explain away his falsehoods in terms of the obstacles which confronted his early job applications, the tangled web which ensued, and his original (erroneous) assumption that he would be too obscure to be worth detecting. Meanwhile, he also persisted in his union work and his public opposition to Library employment practices, including the ALA investigation.

By March 1972, Cary had expressed his opinion to Hutchinson by memorandum that the proper sanction for Williams' misrepresentations was termination. In June, having tried to make certain that the decision was correct and based on precedent, Hutchinson finally gave his formal recommendation that Williams

be terminated, which recommendation was accepted by the Librarian. As stated by Lorenz, Library management had made every effort to ensure that their action "could not be interpreted as a discriminatory action." Williams was notified that his employment would be terminated effective July 21, 1972.

On July 20, 1972, on the last day before termination, Williams was permitted to resign effective August 11, 1972. During this hiatus, Williams and friends tried unsuccessfully to arrange a demotion and transfer instead of termination. On August 9, he requested to withdraw his resignation. His request was denied and his job ended, requiring Williams to resign as president of Local Employees Union AFGE Local 1826, and as general counsel of the Black Employees of the Library of Congress. An administrative grievance complaint[6] and this suit followed

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6. The report of the EEO officers concluded: "The evidence submitted by Mr. Williams, the
(footnote continued)

The Effect of Williams' Termination

Since his termination, Williams has remained active in Library of Congress employee affairs. He has been serving as executive director of the union at a salary approximately what he earned at the Library. But services available to employees at the Library in administrative proceedings involving discrimination have deteriorated since Williams' termination.

Although Library of Congress Regulations permit employees of the Library to take time from their regular duties to act as EEO representatives for employees with discrimination complaints,[7] retaining their usual salaries,

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(footnote continued)

evidence developed during the investigation and the sworn testimony of witnesses, did not substantiate the charges brought by Mr. Williams." Investigative File of the Discrimination Complaint of Joslyn N. Williams 31 (1976).

7. Library of Congress Regulation 2010.3-1, Resolution of Problems, Complaints, and Charges of Discrimination in Library Employment and Staff Regulations Under the Equal Employment Opportunity Program, § 5.

there was evidence that the Library did not always cooperate enthusiastically with this program.

In response to questioning by the Court, one witness testified that part of the problem in resolving discrimination complaints relates to the absence of people who are willing and, more importantly, able to stand up for employees who have grievances; Williams was the only really efficient, effective person available. "[T]he major problem most people have is that they don't have skilled professional type representation through the EEO office." While the same witness testified that more recently the union for which Williams now works has provided representation for employees with discrimination grievances, the availability of this service remains subject to the union's contract, presently under negotiation. Ms. Ringer, Register of Copyrights, testified that employees are represented by counsel in the EEO process "infrequently" and that the

negotiating process leading to union contracts has been slow and difficult.

The Motive of Library Management

The Court finds that the Library decision to terminate Williams was significantly influenced by Williams' activities as a union leader and a black leader in opposing employment discrimination. Williams' complaints about employment practices at the Library, and particularly the Copyright Office, were not without foundation. Library management, therefore, had understandable reasons for reacting significantly to Williams' anti-discrimination activities. Over several trial days, the Court observed and questioned the Library officials who were in office when Williams' falsification was discovered -- ironically, in the midst of his campaign against Library employment practices. These federal government officials, interacting with each other and reacting to their congressional overseers and to

the Washington environment of the early 1970's did not evidence the initiative and sensitivity about equal employment opportunity and about discrimination which other federal government officials then enforcing the civil rights laws demanded of managers of businesses, universities, state and city schools, and other local functions.

Vignettes impressed the Court:

Despite the obvious need to validate the requirement that copyright examiners hold law degrees (as evidenced by the recent abandonment of the requirement), the former Register, in charge of 300 employees, testified that he was unaware of the concept of "validation." When carrying out his responsibility for administering an affirmative action plan, the former Register refused to assemble information about the relative number of minority employees holding various positions in his office. The Librarian's unusual communication with Congressman Wayne Hays about the decision

not to cooperate with the ALA investigation is special evidence of the intensity of Library management concern and reaction to Williams and his anti-discrimination activity. And Ms. Ringer's case evidences a state of mind in the Library managers consistent with this finding. The Court also notes that at the moment of decision to terminate Williams, the Register of Copyrights was Cary and not Ringer. The Court is influenced in its findings by the evidence of the circumstances which led to Cary's appointment to this key position in the decision-making process that terminated Williams.

The Court fully accepts the testimony of the Library officials that they were without prejudice or bias against minorities, in general, or Williams in particular. And the Court is impressed that Director of Personnel Hutchinson, under new leadership, has been increasingly innovative and responsive to the letter and the spirit of Title VII. But the Court, sitting as a trier of fact, is

persuaded from personal observation of the Library witnesses who dealt with Williams' case that they could not have failed to, and did in fact, react individually and as a group, with considerable intensity, to the threat and provocation inherent in Williams' efforts with respect to Library employment practices. It would have required saintly discipline for these particular Library managers not to be influenced in deciding to terminate him by hostility against his efforts to expose discrimination at the Library.

Record evidence strongly corroborates the informed conclusion of Ms. Ringer, the former Assistant, and now the incumbent, Register of Copyrights that Williams "told a lot of things like they were . . . and . . . this was just unacceptable to some people and was the ultimate cause of the events that led to the separation."

As Judge Weinfeld stated in a related context:

> Even if defendant was in part motivated by [the falsification], the court's finding that its [the defendant's] decision was also motivated by unlawful factors makes the suspension illegal. Equal Employment Opportunity Commission v. Kallir, Philips, Ross, Inc., 401 F.Supp. 66, 72 n. 17 (S.D.N.Y. 1975).

[1] The Court finds, therefore, for the reasons stated, that the Library decision to terminate Williams was motivated in substantial part by hostile management reaction to his leadership of the minority employee's protests against discrimination, in violation of Section 704(a) of the Civil Rights Act of 1964.[8] Accordingly, judgment will be entered for plaintiff.

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8. Section 704(a) of the Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

II.

Before turning to the question of relief, it is appropriate to set out in the record the Court's basis for two procedural rulings which counsel for plaintiff continually contested throughout pretrial and trial.

Denial of Class Certification

[2, 3] Aware that Judge Jones' decision with respect to class certification remained provisional even as the action approached decision, the Court has reconsidered that decision and has found, in light of the facts as they have become apparent during pretrial and trial, that the decision was and is sound. Although suits alleging racial discrimination are often by their very nature class actions, careful attention to the requirements of Fed.R.Civ.P. 23 remains indispensable.

Williams' mere allegation of racial discrimination does not insure that he will be representative of those who have been the actual victims. See East Texas Motor Freight System Inc. v. Rodriguez, 431 U.S. 395, 97 S.Ct. 1891, 1898, 52 L.Ed.2d 453 (1977)(relating to the adequacy of representation).

[4] From the facts set out above, it is apparent that as a result of his activities, Williams occupied a special position at the Library, and that the decision to terminate him was not made in the ordinary course of Library management. The significant issue raised by Williams' case was whether the motive underlying his termination was retaliatory, not whether his termination was the result of racial discrimination. Williams' remarkable success at the Library belies any contention that he was the victim of any

racial discrimination. His claim is, therefore, not typical of those of the class he seeks to represent and the factual issues involved in his claim are not common to the claims which black employees generally might have. Compare Satterwhite v. City of Greenville, 395 F.Supp. 698 (N.D.Texas 1975), remanded for further proceedings, 557 F.2d 414 (5th Cir. 1977), Kinsey v. Legg, Mason & Company, Inc., 60 F.R.D. 91 (D.D.C.1973). The Court, therefore, reaffirms the conclusion that it would have been inappropriate to clutter the trial of Williams' claim with issues of systemic discrimination from which Williams did not suffer. Compare Mason v. Calgon Corporation, 63 F.R.D. 98 (W.D.Pa. 1974), Davis v. Ameripol, Inc., 55 F.R.D. 284 (E.D. Texas 1972).

Exclusion of Evidence of Systemic Discrimination

[5] Plaintiff has proffered voluminous evidence of "systemic discrimination" on the part of the Library in many aspects of its treatment of employees. This evidence has been admitted for the limited purpose of showing that Williams' protests were not without foundation, and that the public denials made by Library officials in the fact of that evidence demonstrated a need for representational services like those performed by Williams. It has been excluded on the other issues Williams has raised notwithstanding the importance generally attached to this type of evidence, even in cases involving only individual plaintiffs.[9]

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9. E.g., McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), Kinsey v. First Regional Securities, 557 F.2d 830 (D.C.Cir. 1977).

In order for Williams to challenge successfully the routine employment practices of the Library, under the evidentiary scheme set out in McDonnell Douglas, he would have to show some unfavorable treatment, analogous to the refusal to hire Green in McDonnell Douglas. After he had produced evidence of different treatment from that received by other employees, the burden would shift to the Library to articulate some legitimate, non-discriminatory justification for its actions. Only then would the type of evidence Williams has sought to introduce become material. At that point it would be Williams' burden to show that the non-discriminatory justification was mere "pretext." Williams has not succeeded in reaching the first step of this scheme. The evidence reveals that until the discovery of his misrepresentation, he suffered no employ-

ment disadvantages. There is no reason, therefore, to allow Williams to demonstrate discriminatory motive in other employment decisions.

Nor is the evidence of systemic discrimination admissible to show discriminatory motive in the decision to terminate Williams. This case is distinguishable from Kinsey because of the sui generis process by which the decision to fire Williams was made. In Kinsey the refusal to hire the plaintiff was made in the ordinary course by personnel charged with making routine employment decisions. Williams brought before the Court individuals who had devoted considerable attention to the decision. This testimony contained substantial evidence of the motives of these witnesses, much more probative than that contained in Williams' proffer. In light of the Court's finding on the question of motive, the exclusion of the

evidence cannot be said to have prejudiced Williams.

III.

Relief

Entry of judgment for Williams and against the Library does not, of course, end this action in equity. The Court must fashion a decree which attempts to remedy the situation created by the retaliatory termination of Williams without rewarding him for making significant and repeated false representations of his legal education and credentials.

The Court is authorized to grant tailor-made injunctive relief by the broad language and legislative history of § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the

> respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. (Emphasis added.)

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Supreme Court set out some of the legislative history of this section and commented on the purposes underlying the broad language:

> "In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong.Rec. 7168 (1972).

> As this makes clear, Congress' purpose in vesting a variety of "discretionary" powers in the courts was . . . to make possible the "fashion[ing] [of] the most complete relief possible." 422 U.S. at 421, 95 S.Ct. at 2373 (quoting from a Section-by-Section Analysis introduced by Senator Williams to accompany the Conference Committee Report on the 1972 amendments to Title VII).

Judge Gasch of this Court recently held in Smith v. Califano, 446 F.Supp. 530 (1978), that an agency has the authority under Title VII to award attorneys' fees to a party who prevails at the administrative level, and that district courts may review agency decisions not to award attorneys' fees. Judge Gasch's analysis of the interrelatedness of the administrative and judicial mechanism for enforcing the rights created by Title VII is particularly germane here. If attorneys' fees may not be awarded for service to employees contesting discrimination at the administrative level, a

strong incentive is created for the employee (and his attorney if he has one)[10] to treat an administrative remedy provided by the agency as a pro forma formality which must be played out before the merits of the grievance can be seriously aired for the first time in court. Where this incentive is combined with a demonstrated hostility on the part of an agency toward employees who assist other employees in obtaining relief for violations of Title VII,

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10. The desirability of representation in the administrative process is recognized by the Civil Service Commission Regulations at 5 C.F.R. § 713,214(b), which provide that an employee may be represented by counsel throughout the EEO administrative process beginning with the counseling stage, and by Library of Congress Regulation 2010.3-1, which in section 5 provides that an employee shall have the right to be accompanied, represented, and advised by a representative of his own choosing. The Library's regulation seems also to recognize the financial burden obtaining proper representation may pose for the employee. As mentioned earlier, it provides that employees may use official time to represent other employees with grievances.

the administrative grievance procedure is likely to lose its dispute resolving capability, thereby exacerbating the effects of discrimination in the agency and imposing a disproportionate burden on the courts. This condition requires special measures to insure the utility of the administrative process.

[6] Relief inuring directly to the personal benefit of the plaintiff is not the exclusive equitable relief device available to the courts for redressing this violation of Title VII. Saracini v. Missouri Pacific Rail-Co., 431 F.Supp. 389, 395-96 (W.D.Ark. 1977). "[T]he court has a special responsibility in the public interest to devise remedies which effectuate the policies of [Title VII] as well as afford private relief to the individual employee instituting the complaint." Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201

(7th Cir. 1971)(citations omitted).

The decision of the Supreme Court in Albemarle, limited the discretion of trial courts to refuse to order back pay in Title VII cases, and required that if the District Court does decline to award back pay, it carefully articulate its reasons. 422 U.S. at 421, n. 14, 95 S.Ct. 2362. The standards governing the exercise of discretion which the Supreme Court found in the statutory scheme require that "backpay . . . be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421, 95 S.Ct. at 2373. The awarding of back pay serves the statutory purpose of eradicating discrimination by providing "'the

spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page of this country's history.'" 422 U.S. at 417-18, 95 S.Ct. at 2371-72. This purpose is not frustrated by the relief to be granted here which denies Williams back pay because of his false statements but provides relief for the public interest damaged by the retaliatory element of the decision to terminate him.

[7] Williams was illegally discharged. But Williams also falsely represented himself to be first a law student and then a law graduate. No court should take such calculated falsehoods lightly.[11] This is not a case of

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11 Williams' misrepresentation may be a violation of 18 U.S.C. § 1001. Williams' employment application contained a notice that a false statement might be grounds for dismissal.

misrepresentation of a qualification which is significant only because a particular employer believed the qualification important for a particular job. Misrepresentation that one is qualified to act as a lawyer has significance, specially in a court of law, independent of the misleading of the employer. Williams' continuing charade also deceived those on whose behalf he acted in attempting to resolve employment grievances at the Library.

Despite Williams' deficiencies, as a practical matter, he was more willing and more able to represent employees with discrimination grievances at the administrative level at the Library than anyone else whose services were available to those employees. Record evidence supports the conclusion that neither Williams, as an outsider, nor anyone

else has since provided the effective representation which Williams as an employee provided for his colleagues.[12] His termination has seriously diminished the representation available to minority employees of the Library, exacerbated the disputes at the Library about discrimination in employment, and diminished the confidence of minority employees in the fairness of the Library grievance procedures.

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12. See p. 1122, supra. In addition to the testimony received during the trial, the Court solicited written submissions from the parties "describing existing Library procedures for the redress of employment discrimination grievances (including the role of unions and outside counsel therein) . . .." Order of December 21, 1977. Defendant's Statement Describing Existing Library Procedures for the Redress of Employment Discrimination Grievances (Including the Role of Unions and Outside Counsel Therein) . . ., filed January 9, 1978, and Plaintiff's Submission . . ., filed January 24, 1978, further document the need for the effective representation at the administrative level which Williams attempted to provide.

These facts are dramatically evidenced by the filing of over 40 cases in this Court which might have been disposed of administratively if Libarry employees were better represented at the administrative level or had more confidence[13] in this process.

This unique case, therefore, requires a unique remedy: one which discharges the Court's responsibility for the enforcement of Title VII, serves the public interest in eliminating discrimination, and relates to the wrong suffered by the plaintiff but at the same time denies to him personally equitable remedies

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13. Several of the 40 cases were filed by a single employee who had no lawyer and represented himself pro se. See e.g., Parker v. Boorstin, No. 75-1772 (D.D.C. Aug. 31, 1976) (Jones, C. J.) and Judge Jones' observation that Parker's "engagement of counsel to guide him through the labyrinth of administrative law would serve him well. It would save him time, energy and expense and it would enable this Court to better focus on his complaints." Slip op. at 9.

which would reward him for his own misconduct. For the reasons set out above, having entered judgment for Williams, the Court declines to award relief directly to him. Instead the Library will be directed by an order to be issued by the Court, after receiving proposals from the parties, to establish and contribute financially to the maintenance of a service for the benefit of Library employees with bona fide discrimination grievances which will enable them to employ legal counsel or lay spokesmen of their choice to counsel such employees and to represent them in administrative proceedings with respect to those grievances. This relief will benefit Williams in the limited and appropriate sense that it will serve the cause for which he strived. The union for which he now works can be considered as a possible participant in and beneficiary

of the service. The relief will serve the public interest in amelioration of employment discrimination. It will impose on the Library responsibility for rectifying the effects of its retaliatory termination of Williams.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1684

September Term, 1980
Civil Action 1633-72

Filed December 9, 1980

JOSLYN N. WILLIAMS
ROBERT L. BOSTICK,
individually and on behalf
of all others similarly
situated

v.

DANIEL J. BOORSTIN
individually and as
Librarian of the Library
of Congress, et al.,

Appellants

Before: Wright, Chief Judge; Bazelor, Senior Judge, McCowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

O R D E R

The suggestion for rehearing en banc filed by appellee having been transmitted to the full Court and no judge in regular active service, and no member of the panel which considered this case, having requested a vote

with respect thereto, it is

ORDERED, by the Court, en banc, that appellee's aforesaid suggestion for rehearing en banc is denied.

Per Curiam
For the Court:

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1684

September Term, 1980
Civil Action 1633-72

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JOSLYN N. WILLIAMS
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situated

v.

DANIEL J. BOORSTIN
individually and as
Librarian of the Library
of Congress, et al.,

Appellants

Before: Bazelon, Senior Circuit Judge; Tamm and Wilkey, Circuit Judges.

O R D E R

On consideration of appellee's petition for rehearing, it is ORDERED by the Court that appellee's aforesaid petition is denied.

Per Curiam
For the Court:

GEORGE A FISHER, Clerk

No. 80-1552

FILED
APR 22 1981
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSLYN N. WILLIAMS, PETITIONER

v.

DANIEL J. BOORSTIN,
LIBRARIAN OF THE LIBRARY OF CONGRESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioner, who had repeatedly misrepresented his academic training and job qualifications, had failed to establish a prima facie case of discrimination based on the decision of the Library of Congress to fire him, because he had failed to show that he was qualified for the job that he held.

2. Whether the court of appeals erred in holding that petitioner had failed to show that the Library's stated reason for firing him (that he had obtained his initial job and subsequent promotions by misrepresenting his qualifications) "was in fact pretext" because the record showed that he was treated in the same way as other employees who had acted in the same way.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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JOSLYN N. WILLIAMS, PETITIONER

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DANIEL J. BOORSTIN,
LIBRARIAN OF THE LIBRARY OF CONGRESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is not yet reported. The opinion of the district court (Pet. App. 1b-40b) is reported at 451 F. Supp. 1117.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1980. A petition for rehearing and suggestion for rehearing en banc was denied (Pet. App. 1c-3c) on December 9, 1980. The petition for a writ of certiorari was filed on March 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Joslyn N. Williams, "a man who engaged in an elaborate masquerade as a purported law student, applicant for the bar, then lawyer in order to obtain and keep a job whose specific required qualifications called for a lawyer" (Pet. App. 2a), seeks review of the decision of the court of appeals, which rejected his contention that he had been discharged by the Library of Congress because of unlawful retaliation in violation of Section 704 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3, and held that he had been discharged because of his lack of qualifications and repeated misrepresentations concerning his qualifications.

1. In January 1967, petitioner applied for a part-time job as an assistant in the law library of the Library of Congress. Petitioner stated in his application that he had attended Howard University from 1956 to 1962, that he had completed four years as a day student and two years as a night student, and that he had completed a total of 142 credit hours. He also represented that he had completed two years of legal study (from 1964 to 1966) in the Faculty of Law of Dalhousie University in Canada, and that he had attended "Georgetown" from 1966 until the date of his application (C.A. App. 132-135). As was later discovered (see pages 3-4, *infra*), these representations, which petitioner certified as true,[1] were substantially and materially false (Pet. App. 8a-11a).

Petitioner was hired for this job and subsequently promoted "because among all the applicants he appeared to be relatively better qualified on the scale of legal education"

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[1] Petitioner certified the truth of these statements in his written application under a bold type warning which stated that " '[a] false or dishonest answer to any question in this application may be grounds for rating you ineligible for Federal employment, or for dismissing you after appointment, and may be punishable by fine or imprisonment (U.S. Code, Title 18, Sec. 1001).' " Pet. App. 9a.

(Pet. App. 14a). Indeed, when petitioner was selected for his initial position, the Recommending Officer explained that "Mr. Williams, by reason of his completion of two years of law school, is better qualified to perform the duties of the position than the remaining candidates" (C.A. App. 138). A few months later, petitioner was likewise selected for a full-time job in the Copyright Office of the Library, (a position that required a law degree) because the Recommending Officers were impressed with him and his educational background (Pet. App. 14a-15a). One of the Recommending Officers subsequently confirmed that " '[i]t was principally because of his alleged past and continuing law school experience that we decided to recommend Mr. Williams' appointment as a Copyright Examiner' " (*id.* at 15a). As the court of appeals explained, petitioner "perpetuated his ruse by 'acting like a lawyer'—in the words of the district court, '[leading] his friends and his critics to believe him to be a trained and effective lawyer'—and requesting leave in 1970 and again in 1971 supposedly to study and sit for the Maryland bar examination" (*id.* at 15a-16a). During the course of his employment, petitioner was a leader in employee efforts to combat alleged prejudice at the Library (*id.* at 17a-19a).

Petitioner's misrepresentations concerning his educational background were eventually discovered, as the court of appeals noted (Pet. App. 16a-17a):

> [I]t was discovered eventually that Williams as a lawyer was a fake. In a Library training session on copyright law, Williams apparently did not quite "think like a lawyer," thereby arousing the suspicion of the instructor. This suspicion prompted an investigation. The complete record of continuous deceit was then revealed, and, after a period of stubborn false denials, subsequently conceded by Williams.

In fact, petitioner had completed only one year of legal study in Canada and had actually been dismissed from Dalhousie because of academic failure (Pet. App. 10a). He had never enrolled in, audited, or regularly attended classes at the Georgetown University Law Center (*id.* at 10a-11a). He had also misrepresented his college studies by exaggerating the number of credit hours that he had successfully completed (*id.* at 11a). As the court of appeals noted (*ibid.*), "he did actually receive a Bachelor of Arts degree from Howard, but this alone would not have entitled him to any consideration whatsoever for the position for which he applied in 1967, and [petitioner] knew this."

2. The district court found that petitioner had obtained his initial employment and subsequent promotions at the Library by falsely stating that he was a law student and then a lawyer. The court said that "[n]o court should take such calculated falsehoods lightly" (Pet. App. 35b-36b). The court found that petitioner had failed to establish a prima facie case of racial discrimination, and that he was not a victim of racial discrimination (*id.* at 20b, 24b-25b, 27b-28b). However, the court found unlawful retaliation, based on its view that the Library officials "could not have failed to, and did in fact, react individually and as a group, with considerable intensity, to the threat and provocation inherent in Williams' efforts with respect to Library employment practices" (*id.* at 21b). In the district court's view, "[i]t would have required saintly discipline for these particular Library managers not to be influenced in deciding to terminate [petitioner] by hostility against his efforts to expose discrimination at the Library" (*ibid.*).

In light of the circumstances, however, the district court declined to grant any relief to petitioner. Instead, the court ordered the Library "to establish and contribute financially to the maintenance of a service for the benefit of Library employees with *bona fide* discrimination grievances which

will enable them to employ legal counsel or lay spokesmen of their choice to counsel such employees and to represent them in administrative proceedings with respect to those grievances" (Pet. App. 39b).[2]

3. The court of appeals reversed, holding that the standard articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), "is utterly inconsistent with a finding of discrimination in this case" (Pet. App. 3a-4a). The court emphasized "the depth and persistence of Mr. Williams' lies and their material relation to his original job and later promotions" (*id.* at 7a-8a), and concluded that "[a]n egregious record like this one hardly poses the ideal case for a whisper of a racial discrimination complaint, let alone an employment discrimination lawsuit" (*id.* at 17a).

After thoroughly discussing (Pet. App. 29a-37a) the standard articulated by this Court in *McDonnell Douglas Corp.* v. *Green, supra*, the court of appeals held (Pet. App. 38a-39a) that petitioner had failed to establish a prima facie case of employment discrimination because he had not shown that he was qualified for the job that he lost when his fraud was discovered. Petitioner was not qualified because he was not a lawyer (*id.* at 38a-39a). Moreover, his fraud clearly showed that he lacked the necessary trustworthiness, reliability, veracity and good judgment required of copyright examiners (*ibid.*). The court also noted that even if petitioner's evidence were sufficient to establish a prima facie case, it was clear that the Library had articulated a legitimate nondiscriminatory reason for firing him, and that he had not shown that that reason was a pretext for discrimination. As the court explained, the Library would have fired petitioner absent any retaliatory motive because his knowing and willful lies were a criminal offense, and the

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[2]Congress subsequently prohibited the Library from funding this plan. Act of Sept. 30, 1978, Pub. L. No. 95-391, Section 308, 92 Stat. 789; H.R.J. Res. 412, 95th Cong., 2d Sess. (1979).

propriety of this sanction for such conduct was well established both at the Library and in other agencies (Pet. App. 41a-44a).

ARGUMENT

The decision of the court of appeals in this extraordinary case is manifestly correct. But for petitioner's repeated material misrepresentations concerning his job qualifications, he would never have been considered for employment at the Library. That petitioner was fired when his lies were discovered hardly suggests discrimination. Further review is unwarranted.

1. The decision of the court of appeals is bottomed on petitioner's lack of qualifications for a job that he acquired by fraud. There is no merit to petitioner's contention (Pet. 28-33) that the court erred in requiring him to show that he possessed the minimum qualifications for this job. Although petitioner claims that his admitted lack of qualifications is irrelevant, it is well settled that "Congress did not intend by Title VII * * * to guarantee a job to every person regardless of qualifications." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). Thus, "the alleged discriminatee [must] demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). Where, as here, a person never would have been considered for employment but for misrepresentations with respect to his qualifications, it is hardly unreasonable to require that he demonstrate his job qualifications as part of his prima facie case.[3] In short, the court below correctly held that

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[3]As the Court recently noted in *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764 (Mar. 4, 1981), slip op. 5, "[t]he prima facie case serves an important function in the litigation: it eliminates the

petitioner had not established a prima facie case of discrimination because he had not established that he held the requisite qualifications. The court of appeals aptly explained this requirement (Pet. App. 32a-33a; footnote omitted):

> Title VII imports no suggestion that the less qualified shall be favored over the more qualified simply by virtue of their connection with some protected antidiscrimination activity. No good reason exists for allowing a non-qualified employee to invoke Title VII to cure deficiencies in his or her qualifications, or to immunize potentially serious defects in the worker's job profile. It would be incongruous—and certainly not required by law—to give any employee, even one engaged in exemplary efforts to vindicate the law of the land, a stranglehold on a job irrespective of that employee's material, work-related flaws.

2. Because petitioner failed to establish that he possessed the requisite qualifications for the job that he held (and from which he was fired because of his misrepresentations concerning his qualifications) and thus failed to establish a prima facie case of discrimination, there is no reason for this Court to grant review here, as petitioner suggests (Pet. 20-28), to resolve an alleged conflict among the circuits as to whether a Title VII plaintiff must prove, as part of his "pretext" showing, that he would not have been discharged "but for" his having engaged in protected activity. Even if petitioner had established a prima facie case, however, it would be abundantly clear that the Library discharged its burden to articulate lawful reasons for its action (see *Texas Department of Community Affairs* v. *Burdine*, *supra*, slip

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most common nondiscriminatory reasons for the plaintiff's rejection." The evidence necessary to establish a prima facie case depends, of course, on the particular context in which the discrimination is alleged to have occurred. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 357-358.

op. 6-7), and that petitioner failed to show that the Library's explanation was a pretext for discrimination.

Petitioner's lies were knowing, willful and criminal; the disciplinary action that he received was both appropriate and consistent with regular practice (Pet. App. 42a-44a). The court of appeals correctly held that petitioner's conduct would have warranted termination of his employment in any event, and the court's application of the standard articulated in this Court's decision in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), was clearly correct. See also *Robison* v. *Wichita Falls & North Texas Community Action Corp.*, 507 F. 2d 245, 256 (5th Cir. 1975) (Wisdom, J.) ("Just as the First Amendment cannot limit the public's power to dismiss the inept, it also cannot limit the public's power to dismiss the corrupt"). Finally, petitioner's contention (Pet. 20-28) that the *Mt. Healthy* test (which was developed in the First Amendment context) affords insufficient protection to the rights created by Title VII, is insubstantial.[4] The court below properly noted (Pet. App. 36a-37a; footnote omitted):

> This standard is plainly correct, as it not at all precludes a finding of Title VII violation when an employer acts for mixed motives. The mere presence of a legitimate purpose underlying the discharge will not sterilize unlawful retaliation, where the latter is in fact the dispositive cause. The *but for* standard simply

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[4]Petitioner's reliance (Pet. 26-28) on retaliation cases under the National Labor Relations Act is misplaced. As the First Circuit has recently noted, the National Labor Relations Board now applies the *Mt. Healthy* test in such cases. See *Statler Industries, Inc.* v. *NLRB*, No. 80-1455 (1st Cir. Mar. 12, 1981), slip op. 4-5. Moreover, the courts of appeals have been divided, at best, as to whether a "but for" test should be applied in such cases. See, *e.g.*, *Western Exterminator Co.* v. *NLRB*, 565 F. 2d 1114, 1118 & n.3 (9th Cir. 1977).

compares the adversity faced by the plaintiff employee (who had engaged in conduct protected by Title VII) with conditions imposed on similarly situated employees who did not engage in protected conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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